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IN THE

Supreme Court of the United States

October Term 1963

No. 233 4

MONGOOSE GIN COMPANY and
CLINTON MANGES, *Petitioners*

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

MONGOOSE GIN COMPANY, BY
CLINTON MANGES, PRESIDENT,
CLINTON MANGES, INDIVIDUALLY
P. O. Box 1471, Harlingen, Texas
Petitioners

Alpha Law Brief Co., M & M. Bldg., Houston, Texas 77002

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MONGOOSE GIN COMPANY and
CLINTON MANGES, *Petitioners*,
VS.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES; AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Mongoose Gin Company and Clinton Manges, Petitioners pray that writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's judgment entered in this cause on April 15, 1964.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 55) and judgment of the District Court (R. 53) are unreported and are shown in Appendix A on page 17 of this petition.

The opinion of the Court of Appeals included in the record (R. 59) and as Appendix B on page 19 of this petition is ~~not yet~~ reported in the Federal Reporter, Second Series. Vol. 331, P. 483

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed is dated and entered April 15, 1964, (R. 63), and a copy is included as Appendix C on page 23 of this petition.

The order of the Court of Appeals (R. 89) denying Petitioners' petition for rehearing (R. 64-84) and supplemental petition for rehearing (R. 85-88) is dated May 22, 1964, and a copy of same is included as Appendix D on page 26 of this petition.

An order was entered by the Court of Appeals on June 5, 1964, so that the issuance of a mandate would be stayed for a period of 30 days, and a copy of same is shown as Appendix E on page 26 of this petition, and will be shown in a Supplemental Record.

The jurisdiction of this Court is invoked under *Article 1254 (1) of Title 28, United States Code,* and *Rule 19 (1) (b)* of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. The validity of a public sale under a mortgage being a prerequisite to a deficiency judgment under the laws of Texas, as shown in *Casa Monte vs. Ward,* 342 SW2d 812, the following questions must be answered in order to determine whether the Court of Appeals erred in holding that "the sales were conducted within the precise authority granted in the security instruments," (R. 62), namely:

(a) Was the public sale or auction of the movable personal property valid under the chattel mortgage of May 18, 1959, (R. 33) which only authorized a public sale "in the manner prescribed by law," when Texas has no law prescribing the manner of conducting a public sale?

(b) Was the public sale or auction of the immovable heavy gin machinery affixed to the realty valid under the chattel mortgage of May 22, 1959, (R. 39), which only authorized a public sale "in the manner prescribed by law," when Texas has no law prescribing the manner of conducting a public sale?

(c) Was the public sale or auction of the heavy gin machinery affixed to the realty under the deed of trust (R. 29) valid when such gin machinery was sold away from the courthouse and when the deed of trust only authorized a public sale of the property described in said deed of trust at the courthouse door?

2. (a) Petitioners having alleged in their defensive pleadings that the public sales were conducted in such a manner as to constitute a defense to the Respondent's action for a deficiency judgment, and having alleged that the agents of the mortgagee in conducting the sales were guilty of various acts of misconduct and unfairness (R. 13, 16-17,18,20,21), and this being a summary judgment case, did the Court of Appeals err in holding such pleadings were insufficient to raise the defense of invalidity of the public sales (R. 60, 61)?

(b) If so, did the Court of Appeals in holding such pleadings insufficient to raise the questions set out in

paragraph 1 above, depart from the accepted and usual course of judicial proceedings under *Rule 19 (1) (b)* of *the Supreme Court Rules?*

3. Did the Court of Appeals err in affirming the judgment of the trial court without opinion, findings of fact or conclusions of law of any kind except the finding that the Defendants have not alleged any facts showing that the actions of the trustee (in conducting the sale) were detrimental to them even if portions of the answer of Defendants stricken by the Court (paragraphs 6 to 13) are considered?

STATEMENT OF THE CASE

Respondent brought this action for a deficiency judgment (R. 4,7) against Mongoose Gin Company, as principal, and Clinton Manges, as guarantor, on a $250,000 note and three mortgages executed by Petitioners to the Small Business Administration, after the agent for the S.B.A. had sold the "land and buildings" under the deed of trust at a public sale (R. 29); and after having attempted to sell the gin machinery at a public sale away from the courthouse either under the deed of trust (R. 29) which did not authorize a sale except at the courthouse door, or under the Chattel mortgage of May 22 (R. 33) which did not prescribe any manner for conducting a public sale, and when the laws of Texas do not prescribe any manner for conducting a public sale; and after having attempted to sell the movable personal property at a public sale under the chattel mortgage of May 18 (R. 39) which also did not prescribe any manner for conducting a public sale.

The chattel mortgages of May 18 (R. 33) and May 22 (R. 39) each authorized the mortgagee, in case of default by the mortgagor, (a) to sell at private sale with or without notice (this was not done); or (b) to sell all or any part of said property *at public sale in the manner prescribed by law*, (this was attempted to be done); or (c) to enforce its lien by suit in court. The Court of Appeals said, "No effort was made to sell at a private sale, and there was no effort to enforce the lien by a suit in court." (R. 61).

The Petitioners answered and described the deed of trust and two chattel mortgages and referred to same "for all purposes" (R. 12). The deed of trust and chattel mortgages are shown as Exhibits A, B and C on pages 29, 33 and 39 of the Record.

Respondent in its request for admissions also described and requested Petitioners to admit the execution of said deed of trust and two chattel mortgages (R. 27), and the execution was admitted by Petitioners. (R. 45).

The Petitioners' answer affirmatively alleged in six places that the manner of conducting the sale, the notices issued, etc., constitute such misconduct or unfairness in the sales of the security as to constitute a defense to the Respondent's action for a deficiency (R. 13, bottom R. 16, top R. 17, R. 18, 19, 20 and 21); that many persons were present at the sale ready, able and who wanted to bid, but no one did bid except Metals Development Company and the S.B.A. R. 19); that the deed of trust required that the property covered by the deed of trust be sold "at the courthouse in the county where such property is situated," but that the scales, concrete foundations and other fixtures permanently

attached to the lots and buildings were sold "at a place other than the courthouse door" and that all of such action "does constitute a defense to its action for a deficiency judgment;" that the misconduct occurred at the sale under the deed of trust and also at the sales under the two chattel mortgages; that Petitioners had orally agreed with 12 men for them to purchase the mortgaged property for $432,000, being the reasonable value of the mortgaged property (R. 20), and that a contract for such sale had been drawn up and 7 of the 12 persons had signed the contract (R. 21). Again, on R. 21, the Petitioners alleged that such conduct (on the part of the mortgagee), constituted misconduct and unfairness in the sales of such a nature as to constitute a defense to the Plaintiff's action for a deficiency judgment." (R. 21).

Respondent moved that paragraphs 6 to 13 of the Petitioners' answer containing the above allegations as to misconduct and the manner of conducting the sale which constituted a defense, be stricken (R. 22), and such motion was granted. (R. 47). The Respondent then moved for summary judgment (R. 48), and same was granted (R. 53), the trial court finding that "the Defendants have not alleged any facts showing that the actions of the trustee were detrimental to them" even if the stricken portions are considered. (R. 54).

BASIS OF FEDERAL JURISDICTION IN THE TRIAL COURT

Section 1345, Title 28, United States Code.

ARGUMENT FOR ALLOWANCE OF WRIT

These Petitioners say that the Court should grant this writ under *Rule 19 (1) (b) of the Supreme Court Rules*

because the Court of Appeals, in upholding a summary judgment on the ground that the pleadings were insufficient to raise the defense of invalidity of the two public sales under the chattel mortgages or the public sale of the gin machinery away from the courthouse under the deed of trust, clearly departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by the lower court as to call for the exercise of this Court's power of supervision.

Petitioners' answer pleaded and referred to, and the motion for summary judgment adopted, the two chattel mortgages which limited the power of the mortgagee to conduct public sales "in the manner prescribed by law." After said instruments were before the trial court in pleadings and exhibits, affirmatively showing that the mortgagee was limited in conducting public sales "in the manner prescribed by law," we think that Petitioners were not required to allege that Texas had no such law.

Petitioners alleged that the public sales under the two chattel mortgages were conducted in such manner as to constitute misconduct and unfairness and in such manner as to constitute a defense to the Respondent's action for a summary deficiency judgment. Respondent did not ask for a bill of particulars to require Petitioners to give further particulars showing why the manner of conducting the sales by Respondent constituted a defense to a summary deficiency judgment. We think this action of the trial court clearly comes under the rule announced by Mr. Justice Goldberg on page 230 of the opinion of this Court in *Foran vs. Davis*, 83 S.Ct. 227. Surely this judgment should not be upheld simply because the attorneys for Petitioners may have made a misstep in failing to allege that Texas

does not have any law prescribing the manner of conducting public sales under chattel mortgages, or in failing to allege that the chattel mortgages themselves did not prescribe any manner authorizing such public sales, when the chattel mortgages themselves affirmatively showed that such authority was lacking.

It seems to us that the allegation that the sales were conducted in such manner as to constitute a defense to a deficiency judgment was sufficient to raise the defense that the public sales under said two chattel mortgages were unauthorized and hence invalid and could not form the basis for a deficiency judgment. Since Respondent did not file any motion for a bill of particulars, it seems to us that the Court of Appeals in holding that the defense set out above "was not included in their defensive pleadings" (R. 61) is using the approach that pleading is a game of skill, and that a misstep by counsel for Petitioners in the use of language in saying that the manner of conducting the sale under the two chattel mortgages constituted a defense deprives him of such defense; and this approach was rejected by this Court in *Foran vs. Davis,* 83 S.Ct., 227 on page 230.

The United States District Court rendered a summary judgment for the Plaintiff (Respondent) without opinion, findings of fact or conclusions of law except that the court in a docket entry (R. 55) and in its judgment (R. 53-54) found that "Defendants have not alleged facts showing that the actions of the trustee were detrimental to them even if portions of Defendants' answer stricken by order of this court dated March 26, 1963, are considered." (R. 54, 55).

It seems to us that the action of the trial court, affirmed by the Court of Appeals, in rendering summary judgment without opinion, findings of fact or conclusions of law of any kind except as set out above, constituted such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. It seems to us that if this case is on an exact parallel with this Court's memorandum opinion in *United States vs. Continental Oil Co.*, 84 S.Ct. 1155. It also seems to us that in the hearing on motion for summary judgment, more detailed pleadings as to the lack of any law or contract authorizing the public sales under the two chattel mortgages, were not required under the rules laid down in *Rossiter vs. Vogel*, 134 F.2d 908.

In their supplemental petition for rehearing in the Court of Appeals (R. 85) filed simultaneously with their original petition for rehearing (R. 64), Petitioners asked the Court of Appeals to make certain findings of fact and conclusions of law, namely: (1) That the gin machinery under the May 22 chattel mortgage was sold at public sale away from the courthouse; (2) that the deed of trust did not authorize a public sale of the gin machinery except at the courthouse; (3) that the chattel mortgage of May 22 did not authorize a public sale of the gin machinery except "in the manner prescribed by law;" (4) that Texas has no such law; (5) in Texas, the authority of a mortgagee to conduct a public sale under a chattel mortgage is purely contractural; (6) the public sale of the gin machinery was unauthorized, and (8) would not support a deficiency judgment, and (9) Mongoose Gin Company and Manges were not parties to the suit of *Metals Development Co., vs. United States*, 322 F.2d 210, referred to by the said Court in its opinion

(R. 62), and are not bound by the findings of fact in that case.

The public sales of the mortgaged property alleged by Petitioners (Defendants) in their answer to be worth $432,000 (R. 20) were attempted to be made under the chattel mortgage of May 18 as to the movable personal property (R. 33), and under either the deed of trust (R. 29) or the chattel mortgage dated May 22 covering the gin machinery affixed to the realty (R. 39). The gin machinery was sold away from the courthouse. Hence it could not have been legally sold under the deed of trust which limited such sales to take place at the courthouse. The Court of Appeals does not say whether the gin machinery was sold under the deed of trust or the chattel mortgage of May 22. Under the chattel mortgage of May 22, the public sale as to the gin machinery could only be conducted "in the manner prescribed by law." Texas does not have such a law. The Texas law is stated in *Campbell vs. Eastern Seed & Grain Co.*, 109 S.W.2d 997, the Texas law being that sales under a chattel mortgage are purely creatures of contract. The S.B.A. could have sold the gin machinery at private sale, with or without notice, or could have enforced its lien by suit in court, but chose not to exercise these remedies. It chose to conduct a public sale or public auction, and to uphold that sale as to the gin machinery, the Court of Appeals was compelled to hold that the authority given in the chattel mortgage of May 22 to sell at public sale in the manner prescribed by law, authorized the public sale in a manner not prescribed by law. In Texas, the validity of a public sale is a prerequisite to a deficiency judgment. *Casa Monte vs. Ward*, 342 S.W.2d 812.

Since a valid sale was a prerequisite to a deficiency judgment in this case under *Casa Monte vs. Ward* 342, S.W.2d 812, the Court of Appeals judgment conflicts with the applicable state law of Texas as announced in *Campbell vs. Eastern Seed & Grain Co.*, 109 S.W.2d 997, when it held that the "sales were conducted within the precise authority granted in the security instruments" (R. 62), when, in fact, two of the security instruments, the chattel mortgages, only said that the public sale could be conducted "in the manner prescribed by law," and neither the chattel mortgages nor the laws of Texas prescribe any manner for conducting such public sales.

If the Court of Appeals meant that the gin machinery was sold under the deed of trust as a "security instrument," then the sale of said gin machinery, having been made, as alleged in Petitioners' answer, away from the courthouse in violation of the express terms of the deed of trust, was void. *Fireman's Fund Insurance Co. vs. Wilson,* 284 S.W. 920, holds that a similar sale was void because "It was not made in the place specified in the mortgage."

The opinion of the Court of Appeals is not clear, but we think it meant to hold that the gin machinery was severed from the realty under the May 22 chattel mortgage and authorized the public sale forming the basis for the deficiency judgment in this case under the clause authorizing "a public sale in the manner prescribed by law" even though the chattel mortgage itself and the laws of Texas do not prescribe any such manner. Surely that is in direct conflict with the holding in *Campbell vs. Eastern Seed & Grain Co.*, 109 S.W.2d 997, and is directly in Conflict with the holding in *Casa Monte vs. Ward,* 342 S.W.2d

812, holding the validity of such a sale is a prerequisite to a deficiency. The reason for the rule is set out by the Supreme Court of Texas in *Bailey vs. Block*, 134 S.W. 323, which points out that the amount of the deficiency judgment cannot be mathematically ascertained until there is a valid sale.

14 C.J.S. page 1029, Section 373, cites the Texas case of *Fireman's Fund Insurance Co. vs. Wilson*, 284 S.W. 920, for the general rule that "the sale must be conducted *in the manner provided by statute or by the mortgage*, and with such diligence and fairness as to obtain the best and adequate price for the property, . . indeed, in the absence of a statute to the contrary, the terms of the mortgage specifying the manner in which the sale shall be conducted must ordinarily be followed." (Emphasis added). There was not any manner specified in the chattel mortgages in this case. The sales were void.

IMPORTANCE OF THIS DECISION

The decision in this case does not affect only these parties. The Small Business Administration has made hundreds of loans in Texas, on its printed forms of chattel mortgages which were used in this case. We think this Court should grant the writ and decide whether this chattel mortgage form used by the S.B.A. authorizing a public sale of the mortgaged property only "in the manner prescribed by law" permits such public sales in the absence of such law, and in the absence of any provision in the mortgage specifying the manner for conducting the sale. Surely the S.B.A., with its many outstanding chattel mortgages on this same form, should know whether it can conduct such a public sale under such a chattel mortgage, in

Texas and in some other states which do not have a law prescribing a manner for conducting public sales under chattel mortgages. Likewise, the buyers at such public sales under the many chattel mortgages now being held by the S.B.A. on this same form, should know whether they are safe in buying property at a public sale under a chattel mortgage which only authorizes "a public sale in the manner prescribed by law," in the absence of any such law. Likewise, the mortgagors should know whether such sales will protect them.

The issues in this case are of special importance to the S.B.A., their debtors and the public whose rights are to be determined under public sales under the limited powers of these chattel mortgages now in common use by the S.B.A.

EQUITIES OF THE CASE

We realize the Government should have its money. Even after the unauthorized sales, the S.B.A. could have resold the property at private sale. It chose not to do so.

The United States in its brief in the Court of Appeals included an Appendix, page 16, setting out that the public sales in question took place on November 7, 1961. The Government bid in the property described in the two chattel mortgages. The S.B.A. again on January 9, 1962, conducted another public auction. At the time of sending this petition to the printer, we do not have a certified copy of the Respondent's brief in the Court of Appeals. We hope to file it as a Supplemental Record solely for the purpose of showing that the mortgaged property was later sold at another public auction and is now gone.

Either the Government or the Petitioners must suffer. While the trial Court found that the Petitioners did not allege any facts showing that the "actions of the trustee were detrimental to them," (R. 54, 55), we think the Petitioners in their answer did allege facts detrimental to them in alleging that the mortgaged property, alleged to be worth $432,000 and then under contract—partly verbal and partly written for that amount—was sold under instruments securing a $250,000 note leaving a deficiency of over $100,000. Surely that was detrimental to them. The Government simply chose an unauthorized method for conducting the sales under its two chattel mortgages, and this unauthorized act resulted in property of the alleged value of $432,000 being sold at public auction for such a sum as to leave a $100,000 deficiency. In balancing the equities, it looks to us as if the Government should lose. The chattel mortgages were on its form. Its limit of authority was obvious. It had ample authority to conduct a legal private sale or to foreclose through the courts. It chose an unauthorized method. This deficiency judgment resulted. In balancing the equities, we say the Petitioners should not lose.

Respectfully submitted,

MONGOOSE GIN COMPANY, BY CLINTON MANGES, PRESIDENT,
CLINTON MANGES, INDIVIDUALLY
P. O. Box 1471, Harlingen, Texas
Petitioners

By: Clinton Manges
CLINTON MANGES

(This petition is signed by Clinton Manges, individually and as President of Mongoose Gin Company, for the reason that his attorneys, Carter, Stiernberg, Skaggs & Koppel, P. O. Box 1471, Harlingen, Texas, are not members of the bar of the Supreme Court.)

THE STATE OF TEXAS)
COUNTY OF CAMERON)

BEFORE ME, the undersigned authority, on this day personally appeared Clinton Manges, who, being by me duly sworn, stated upon oath that he mailed one copy of the foregoing Petitioner for Writ of Certiorari to Mr. Woodrow Seals, United States Attorney, for the attention of Mr. Robert C. Maley, Jr., Assistant United States Attorney, Federal Building, Houston, Texas, by regular United States Mail and another copy of such petition to the Solicitor General, Department of Justice, Washington, 25, D. C., by United States airmail, on June 15, 1964.

Clinton Manges

WITNESS MY HAND AND SEAL OF OFFICE this 30 day of June, 1964.

Betty Jo Campbell

Notary Public, in and for Cameron County, Texas. My commission expires June 1, 1965, and I am authorized by the laws of Texas to administer oaths.

APPENDIX A

Docket Entry made by the Court

"5/15/63 - Plaintiffs motion for summary judgment granted. Defendant's have not alleged facts showing the actions of the trustee were detrimental to them - even if portions of answer ordered stricken are considered. Clerk will notify counsel. Reynaldo G. Garza, U.S. District Judge."

Final Judgment

(Number and title omitted) Filed: June 5, 1963

Be it remembered that on May 15, 1963 came on for hearing the motion of Plaintiff, the United States of America, for Summary Judgment, and the Court being of the opinion that there is no issue as to any material fact, the Defendants not having alleged any facts showing that the actions of the trustee were detrimental to them, even if portions of Defendants' answer stricken by order of this Court dated March 26, 1963 are considered;

It is therefore ORDERED, ADJUDGED AND DECREED that Plaintiff, the United States of America, recover aganist the Defendants, Mongoose Gin Company, a corporation, and Clinton Manges, jointly and severally the sum of $101,488.20 with interest at the rate of six per cent (6%) per annum from date of judgment, until paid, together with its costs.

To which Judgment the Defendants except.

/s/ REYNALDO G. GARZA
United States District Judge

Approved As To Form Only:

CARTER, STIERNBERG, SKAGGS & KOPPEL

By: /s/ LLOYD E. STIERNBERG
LLOYD E. STIERNBERG
Attorneys for Defendants

Entered at Brownsville, Texas
this the 5th day of
June, 1963.

Approved as to form:

WOODROW SEALS
United States Attorney

By: /s/ ROBERT C. MALEY, JR.
ROBERT C. MALEY, JR.
Assistant United States Attorney
Attorneys for Plaintiff

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20939

MONGOOSE GIN COMPANY and
CLINTON MANGES, *Appellants*

versus

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court for the Southern District of Texas

(April 15, 1964)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from a judgment of deficiency against the appellants on a promissory note given to the Small Business Administration in the sum of $250,000. The deficiency was established by the trial court upon allegations of the complaint asserting the execution of the several instruments, which allegations

were all admitted by the defendants, the appellants here, together with the admissions of the truth of requests for admissions to sixteen questions tendered by the government to appellants. Following the response of the appellants to the government's request for admissions, and upon motion, the trial court entered a summary judgment in favor of the United States.

The response of the appellants to the request for admission, admitted the truth of all of the statements made with the exception of the statement contained in number 13, "After allowing all credits from all sources there is due and unpaid on the promissory note described in request for admission number 5 the sum of $86,295.54, plus interest at the rate of 5½% per annum from November 7, 1961." Even as to that statement the defendants made a qualified admission. They stated that the Court had struck certain paragraphs of their answer, and if the court's striking of such paragraphs was legally correct then "request number 13 would be admitted." They further stated, "if the matters set out in defendants' original answer do not constitute a defense, then request number 13 would be admitted, but if they do constitute a defense, then request number 13 would be denied."

This, then, brings us to the question as to whether the trial court erred in striking the parts of the defensive pleadings referred to in appellant's response.

First of all, we should note that appellants here assert a ground of reversal that was not included in their defensive pleadings as a defense to the complaint. This ground

is their contention that when the chattel mortgages were foreclosed, they were foreclosed at public sale without a court order, and that such a sale, not being "prescribed" under the Texas statutes, was void. The two chattel mortgages provided that mortgagee "shall have the right (a) to sell at private sale, with or without notice," or "(b) to sell all or any part of said property at public sale in the manner prescribed by law," or "(c) to enforce its lien by suit in a court." It is clear that no effort was made to sell at a private sale and there was no effort to enforce the lien by a suit in court. The appellants contend that since the Texas statute has no provisions for selling property under a chattel mortgage at public sales, but that such sales are entirely creatures of contract, there could be no forclosure in the terms of the provisions of section (b), because there was no "manner prescribed by law." This point was never raised before the trial court. The point was not included as a ground of defense in the pleadings filed by the appellants, and the appellants by their answer to the request for admissions expressly stated that the deficiency was due unless their defenses *as pleaded* constituted a good defense. This argument, therefore, may not now be made as a basis for a reversal of the trial court's judgment.

The remaining defenses which were ordered struck from the pleadings by the trial court related to the methods of sale of the real property and of the fixtures that were attached to the land. As to this species of property the appellant corporation had executed a separate chattel mortgage, as well as having included it in the original trust agreement given as security to the Small Business Ad-

ministration. As we have heretofore pointed out in the case of *Metals Development Company v. United States*, 5 Cir., 322 F. 2d 210, a case arising out of the same foreclosure sales, the sales were conducted within the precise authority granted in the security instruments, and the appellants can not complain that sales so conducted were in any way unfair to them or that sales thus conducted chilled or stifled the bidding.

To the extent that the trust instrument secured by the real estate, which also purported to include all of the fixtures, was inconsistent with a subsequent execution by the same mortgagor of a chattel mortgage conveying as security the same items the mortgagor is in no position to complain because this was the voluntary act of the mortgagor itself.

We find no error in the action of the trial court in striking the defensive allegations dealing with the method of conducting the sales or the establishment of the deficiency. It having been admitted by the appellants that if the court properly struck these grounds of defense the deficiency was due and owing, the judgment of the trial court must be

AFFIRMED.

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1963

No. 20939

D. C. Docket No. 1513 Civil

MONGOOSE GIN COMPANY and
CLINTON MANGES, *Appellants*

versus

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court for the Southern District of Texas

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 15, 1964

Issued as Mandate:

APPENDIX D

ORDER DENYING REHEARING

Extract from the Minutes of May 22, 1964.

No. 20939

MONGOOSE GIN COMPANY and
CLINTON MANGES, *Appellants*

versus

UNITED STATES OF AMERICA,
Appellee

It is ordered by the Court that the petitions for rehearing filed in this cause be, and the same are hereby, denied.

APPENDIX E

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20939

MONGOOSE GIN COMPANY and
CLINTON MANGES, *Appellants*

versus

UNITED STATES OF AMERICA,
Appellee

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an

order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 5th day of June, 1964.

/s/ ELBERT P. TUTTLE
United States Circuit Judge

(ORIGINAL FILED - JUNE 5, 1964)

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 233

MONGOOSE GIN COMPANY and CLINTON MANGES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WPIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Small Business Administration loaned $250,000 to the Mongoose Gin Company, a Texas corporation. As security for that loan, the Gin Company gave S.B.A. its note, together with a deed of trust and chattel mortgages on certain of the company's property. In addition, the president of the Company, Clinton Manges, unconditionally guaranteed the repayment of the loan.

The company defaulted on the loan, and the property secured by the chattel mortgages and deed of trust was sold by S.B.A. at public auction. However, the proceeds of those sales were insufficient to cover the entire indebtedness. The present action was brought by the United States to recover a deficiency judgment against the company and against Clinton Manges as guarantor (R. 4).[1]

In the district court, petitioners admitted the amount of the loan, the validity of the note, the deed of trust and the chattel mortgages, and the default (R. 26-28, 45). They defended against the imposition of a deficiency judgment on the ground that the sale of the assets was unfairly conducted. In essence, they asserted in their answer that the selling trustee abused his discretion in selling the real property secured by the deed of trust separately from the gin machinery secured by the chattel mortgages, and that this and other actions by the trustee had confused prospective bidders and "chilled the bidding." The district court granted summary judgment to the government, ruling that the facts alleged in defendant's answer did not constitute a defense (R. 53-54).

On appeal, in addition to the matters presented to the trial court, petitioners urged a new ground for reversal. They pointed out that under Texas law the conduct of sales pursuant to chattel mortgages is purely a matter of contract. The chattel mortgages in suit provided three methods by which S.B.A., as

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[1] "R" refers to the Record in the court of appeals, 40 copies of which were filed with the Court by petitioner.

mortgagee, could dispose of the secured property upon default: (1) at private sale, with or without notice to the mortgagor; (2) *"at public sale in the manner prescribed by law"* (R. 36, 42); or (3) by judicial proceedings. The S.B.A. sold the property covered by the chattel mortgages at a public auction sale conducted on the premises of the company. Petitioners contended that this method was unauthorized, since Texas has no law prescribing the manner in which public auction sales under chattel mortgages are to be conducted. Therefore, they argued, the clause of the chattel mortgage authorizing sale at public auction "in the manner prescribed by law" was meaningless. Petitioners concluded that the public sale of the gin machinery was consequently invalid and, since a valid sale was a prerequisite to a deficiency judgment, the judgment against them was erroneous.

The court of appeals affirmed the judgment of the district court, holding that the sales were not unfairly conducted. It stated (Pet. 22):

> [W]e have heretofore pointed out in the case of *Metals Development Company* v. *United States*, 5 Cir., 322 F.2d 210, a case arising out of the same foreclosure sales, the sales were conducted within the precise authority granted in the security instruments, and the appellants cannot complain that sales so conducted were in any way unfair to them or that sales thus conducted chilled or stifled the bidding.

The court did not pass on petitioners' argument that under the chattel mortgages the public sale was un-

authorized because not "prescribed" by Texas law, noting that this argument was not raised before the district court. Petitioners now urge that this Court grant certiorari on the ground that the court of appeals departed from the accepted course of judicial proceedings in refusing to consider all of their contentions.

Even assuming *arguendo* that petitioners have accurately stated the Texas law governing the validity of public sales under chattel mortgages,[2] a contract with the Small Business Administration, an arm of the United States Government, is governed by federal, not State, law.[3] Moreover, contrary to petitioners' assertions, "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Hormel* v. *Helvering*, 312 U.S. 552, 556. The pleadings in the record reveal that the underlying substantive issues which

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[2] But see, *Eichman* v. *Highland Park State Bank*, 345 S.W. 2d 352, 354 (Court of Civil Appeals of Texas, 1961): "The Courts of Texas, since the case of *Singer Sewing Machine Co. v. Rios*, 96 Tex. 174, 71 S.W. 275, 60 L.R.A. 143, have held that a provision in a chattel mortgage which authorizes and empowers the holder to take possession of mortgaged property, upon the mortgagor's default, and sell same at public or private sale is valid." The principal case relied upon by petitioners, *Campbell* v. *Eastern Seed & Grain Co.*, 109 S.W. 2d 997 (Court of Civil Appeals of Texas, 1937), is not to the contrary. It deals only with a private sale without notice, which was upheld as valid. Indeed, the chattel mortgage in *Campbell* was essentially indentical with regard to public sales as in the cases at bar. See 109 S.W. 2d at 998.

[3] *Clearfield Trust Company* v. *United States*, 318 U.S. 363; *United States* v. *Allegheny County*, 322 U.S. 174; *United States* v. *Standard Oil Co.*, 332 U.S. 301. Cf., *Small Business Administration* v. *McClellan*, 364 U.S. 446.

petitioners seek to bring to the Court's attention were not properly raised, litigated, or passed on below. There is thus no occasion for this Court's review. *McCullough* v. *Kammerer Corp.*, 323 U.S. 327. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

SHERMAN L. COHN,
RICHARD S. SALZMAN,
Attorneys.

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